90-420

No. _____

In The

Supreme Court of the United States

October Term, 1990

JACK MANUEL ALVAREZ, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

May police make a gunpoint *"Terry"* automobile stop based upon an anonymous telephone tip, patently false, when the tipster gave no basis underlying the information, and the surveillance of the suspect revealed conduct contrary to the tip manifesting indicia of unrelability?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, JACK MANUEL ALVAREZ, JR., as Appellee, and the Respondent, UNITED STATES OF AMERICA, as Appellant.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, JACK MANUEL ALVAREZ, JR., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

I.

OPINION BELOW

The opinion from the Court of Appeals for the Ninth Circuit, which was published, is attached hereto as Appendix 1. An opinion was issued by the District Court for the Central District of California, which is attached as Appendix 2.

II.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was filed on March 20, 1990; the petition for rehearing was denied on June 7, 1990. The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. Section 1254(a), and the petition is timely.

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. CONSTITUTIONAL PROVISION – Fourth Amendment United States Constitution

B. STATUTORY PROVISION – Rule 41, Federal Rules Criminal Procedure

IV.

STATEMENT OF THE CASE

The origins of this case and the subsequent petition stem from United States District Court, Central District, order suppressing the evidence which was the subject matter of an Indictment charging him with possession with intent to distribute cocaine (21 U.S.C. Section 841(a)(1)), possession of an unregistered firearm (26 U.S.C. Section 5861(d)), and possession of a firearm with the serial number removed (26 U.S.C. Section 5861(h)).

The government proceeded by way of an interlocutory appeal of the suppression order. In a two to one decision, the Ninth Circuit reversed the District Court. It was that reversal which is the subject matter of this Petition.

V.

STATEMENT OF FACTS

On May 12, 1988,[1] at approximately 10:28 A.M., an anonymous call was received by the Santa Ana Police Department which was routinely taped:[2,3]

Dis	Santa Ana Police
A	Yes, I'm calling cause I have information of a possible robbery of a bank this morning.
Dis	Ok, you mean is gonna happen or did?
A	It gonna happen in about ten minutes if you don't hurry up.
Dis	Ok, I'm going to give you to radio.
A	All right.
Radio	Hello, police.
A	Yes, I'm calling you. I have information of a bank robbery that's gonna happen this morning in about ten (10) minutes of the Bank of America on Eighth and Main. The man is driving a white Mustang GT and he's got explosives with him.
Radio	How do you know what's going to happen?
A	I know it's going to happen. Just believe me, he's there.

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[1] A normal Thursday.

[2] "DIS" refers to Dispatcher at the Santa Ana Police Department; "A" refers to Anonymous Caller; and "Radio" refers to the Radio Transmittal Department at the Santa Ana Police Department.

[3] The City of Santa Ana has one of the largest Mexican or Hispanic populations in the State of California.

Radio Ok, what does the guy look like that's going, supposed to rob the bank? A male, white, black?

A He's a tall dark looks kinda Mexican and he's probably in the back of the bank. It will happen in about ten minutes.

Radio He's there right now?

A He should be there now.

Radio Ok, do you have a clothing description, that he's

A No, sorry, that's all I can tell you.

Radio Ok, sir, what's your name?

A Good-bye.

Pursuant to the tip, patrol cars were dispatched to the scene where they established a surveillance at a distance.

The defendant was indeed parked in the Bank of America parking lot, alone in his white Mustang GT.

The officers observed the vehicle in the parking lot for approximately five minutes doing nothing wrong. The vehicle left the parking lot, proceeded on Eighth Street in the City of Santa Ana, turned and thereafter traveled north on Main Street approximately three city blocks (approximately two-fifths of a mile); no vehicle code violation or other unlawful acts were observed. Contrary to the tip, the driver did nothing suspicious nor did he attempt to commit any robbery or make any moves towards the bank.

After a few blocks, the police executed a "felony stop," generally characterized by drawn guns and the

suspect being ordered out of the car over a loud speaker and often "proned out" on the ground. The defendant promptly pulled over to the curb and stopped his car, put his hands over his head in plain view and got out of the car, all as and when ordered.

The driver was ordered out of the car. He complied. Then he was seized in a wristlock. At that time and undoubtedly caused by that maneuver a bulge was then first observed in the petitioner's waist area.

The officers consequently lifted and reached inside the defendant's jacket, uncovering the two revolvers in his possession. The petitioner was thereafter handcuffed and placed in one of the numerous squad cars then on the scene.

Without seeking or obtaining the defendant's consent, the police then rummaged through the interior of the petitioner's car, finding nothing pertinent.

Using the defendant's key, the police then went on to open and search the car's trunk.

In the trunk, the police allegedly found two closed black canvas or nylon bags and one closed cardboard box. The barrel of a gun was conveniently poking out of one of the bags. Opening both bags and the box, the police found, *inter alia*, the three items represented by the three counts herein, two machine guns and a quantity of cocaine.

There was no arrest warrant nor a search warrant supporting any of the foregoing police activity.

The purpose of the stop was illuminated by one of the officers' affidavits:

> "If after stopping Alvarez [petitioner], we found no evidence that he had committed a crime or is about to commit a crime, he would have been free to leave."

Thus, the purpose was to search. The officers saw no illegal conduct, nothing to indicate that a bank was robbed, or was going to be robbed. They saw no vehicular violations of law, and by their own statements the reason the car was stopped was to determine whether there was any evidence of crime. There were no articulated reasons whatsoever to believe that they were observing a crime in progress or about to be in progress. As a matter of fact, it was just the opposite; they observed a lack of unlawful crime activity.

It clearly appears from the totality of the evidence that the officers were dispatched to the scene based on an anonymous call in which the caller refused to either divulge his identity or the basis of his knowledge of why a crime was going to be committed and in which he predicted no future activity that could serve as a reliability litmus. Indeed, it was just the opposite. There was a car in a parking lot with a male. The car remained there for a short period of time and left the area in an ordinary and legal manner. The purpose of the stop and subsequent search by these police, disappointed that the defendant had given them no reason to act, was plainly to trawl and fish for evidence anyway.[4]

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[4] The fact that the panel opinion relies upon a fact not proven in the District Court, to-wit: That while the defendant

(Continued on following page)

VI.

ARGUMENT

A. REASONS FOR GRANTING THE WRIT.

An important question involving a citizen's right to be free of unlawful search and seizure.

B. THE MERITS.

This case has gone further than any case in the Ninth Circuit or the Supreme Court. It allows a forcible gunpoint stop and detention based upon an anonymous tip uncorroborated without more. There was no predictability of future activity which would raise the anonymous tipster's information to a point of minimum credibility.

C. STOP, DETENTION AND ARREST UNLAWFUL.

An ordinary traffic stop is a Fourth Amendment event. *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660 (1979). As such, under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), it must be supported at a minimum by some reasonable or founded suspicion on the part of the police, based on "specific and

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was parked in a bank parking lot, a police car possibly went by his line sight was not one of the objective facts presented by the police officer ordering the stop of the defendant's car at gunpoint and was not considered by the police as part of the equation relating to the stop.

articulable facts," that illegal activity is occurring or contemplated. *United States v. Brignoni-Ponce*, 422 U.S. 873, 880-81, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975).

Because the stop cannot be justified by subsequent events, the founded suspicion must be based solely on those facts and circumstances known to the officers at the time of the stop. *United States v. Patterson*, 648 F.2d 625, 634, n.25 (9th Cir. 1981). Thus, the defendant's unseen holstered pistols are not part of the *Terry* equation.

Even viewing the seizure of the defendant as an everyday traffic stop, it was woefully unfounded, as can be seen by contrasting this case with the facts of the high water mark case in defining *Terry* authority, *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972), as well as the most recent United States Supreme Court decision, *Alabama v. White* (1990) 89-789, ___ U.S. ___.

The facts of *Terry v. Ohio*, 392 U.S. 1 (1967), are well known. An experienced on-the-beat police officer observed first-hand conduct that indicated to him, based upon articulable facts, that the suspect and his companions were about to commit a "stick-up." *Id.* at 28. Consequently, he approached and patted the suspects down for weapons, *id.* at 29, recovering a revolver from Terry.

From *Terry* and its progeny there grows a body of law that clearly states that an officer may make a brief, investigatory, non-intrusive seizure based upon a founded suspicion, on facts and circumstances known to the officer at the time of the stop, that the individual stopped has committed, is about to commit or is committing a criminal offense. *United States v. Thomas*, 844 F.2d 678, 681 (9th

Cir. 1988); *United States v. Patterson*, 648 F.2d 625, 634 (9th Cir. 1981); *United States v. Brignoni-Ponce*, 442 U.S. 873, 880-81, (1975); *Adams v. Williams*, 401 U.S. 143 (1972).

A review of the cases clearly distinguished the difference between supplied information from a citizen informant, *United States v. Sierra-Hernandez*, 581 F.2d 760 (9th Cir. 1978); a crime victim, *United States v. Mahler*, 442 F.2d 1172 (9th Cir. 1971); information from official channels, *United States v. Hensley*, 469 U.S. 221 (1985); from independent sources, *United States v. Coades*, 549 F.2d 1303 (9th Cir. 1977) (*per curiam*); a complete independent police investigation, *United States v. Cortez*, 449 U.S. 411 (1981); *United States v. Sutton*, 794 F.2d 1415 (9th Cir. 1986); and a tip from an untested, unknown and unreliable informant, coupled with additional information which would lend some credence to the anonymous tipster's information.

Anonymous tips are the least reliable source of information, *Illinois v. Gates*, 462 U.S. 213, 237-38 (1983); *Adams v. Williams*, 407 U.S. 143, 146-47 (1972); *United States v. Sierra-Hernandez*, 581 F.2d 760, 763 (9th Cir., cert. denied 439 U.S. 938 (1978)). Dissenting opinion of Justice Reinhardt, *United States v. Alvarez* (1990) 2932, 2936-39, Appendix 2; LaFave, Vol. 3, p. 478. The Ninth Circuit up to the time of this case has consistently held that a telephone tip from an untested, unknown and unreliable informant with no unusual corroborating facts even after surveillance, is insufficient to justify an investigatory stop and brief detention. *United States v. De Vita*, 526 F.2d 81 (1975); citing *United States v. Martin*, 509 F.2d 1211, 1215, n.3 (9th Cir. 1975); *United States v. Larkin*, 510 F.2d 13 (1974).

Furthermore, skeletal, easily observed innocent activities provide no corroboration whatsoever where the tipster is untested in reliability, particularly if the tipster is anonymous. *United States v. De Vita, supra; United States v. Larkin, supra.*

In *Adams v. Williams*, 407 U.S. 143 (1972), a person known to the arresting officer informed the officer that the suspect was in a nearby vehicle, was carrying narcotics and had a gun on his waist. It was undergirded by sufficient reasonable suspicion concordant with *Terry* because:

> "The informant was known to [the officer] personally and had provided him with information in the past. *This is a stronger case than obtains in the case of an anonymous telephone tip.* The informant here came forward personally to give information that was immediately verifiable at the scene. Indeed, under Connecticut Law, the informant might have been subject to immediate arrest for making a false complaint had [the officer's] investigation proved the tip wrong." 407 U.S. at 146-47, 32 L.Ed.2d at 617 (emphasis added; footnote omitted).

It is hard to imagine a sharper contrast. Literally none of the factors relied on by the Court to support reasonable suspicion in *Adams* and *White* are present here.

Alabama v. White, June 11, 1990, 89-789, ___ U.S. ___, there was a detention based upon an anonymous tip and the question was there sufficient corroboration.

In reviewing *Illinois v. Gates, supra, White, supra,* pointed out that *Gates* dealt with an anonymous tip from the probable cause context. The veracity, reliability and

basis of knowledge of an informant remain highly relevant. These are also factors relevant in reasonable suspicion context although allowance must be made in applying them for a lesser showing required to meet that standard. *Gates* recognized that an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity. That is not to say that an anonymous caller could never provide the reasonable suspicion necessary for a *Terry* stop.

White further noted that the tip in *Gates* was not an exception to the general rule because it provided virtually nothing from which one might conclude that the caller is either honest or his information reliable and a tip gives absolutely no indication of the basis for the caller's predictions. By applying something more, as in *Gates*, they have applied basically what they said in *Adams*:

> "Some tips completely lacking in indicia of reliability would either warrant no police response or require further investigation before a forcible stop of the suspect would be authorized. Simply put, a tip such as this one (*Alabama v. White*) standing alone would not warrant a man of reasonable caution in the belief that a stop was appropriate.

There was more, however, though not as detailed and the corroboration not as complete as *Gates*. The required degree of suspicion was likewise not as high. The court further stated:

> "The officer [making a *Terry* stop] . . . must be able to articulate something more than an inchoate and unparticularized suspicion or hunch [*Terry*, 392 U.S. at 27]. The Fourth Amendment requires some minimal level of objective justification for making this stop. *I.N.S. v. Delgado*, 466 U.S. 210 at 217 (1984). That level of suspicion is considerably less than proof of wrong doing by a preponderance of the evidence. We have held that probable cause means a fair probability that contraband or evidence of a crime will be found [*Gates*, 461 U.S. at 238], in the level of suspicion required for a *Terry* stop is obviously less than demanding than for probable cause. [*United States v. Sokolow*, 490 U.S. ___ (1989)]
>
> Reasonable suspicion, like probable cause, is dependent upon both the content of the information possessed by police and its degree of reliability. Both factors – quantity and quality – are considered in the 'totality of the circumstances' – the whole picture . . . *United States v. Cortez*, 449 U.S. 411, 417 (1981). Thus, if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable." [*White* slip opinion, p. 4]

The court concluded that when the officer stopped respondent the anonymous tip had been sufficiently corroborated to furnish reasonable suspicion that respondent was engaged in criminal activity and that the investigative stop therefore did not violate the Fourth Amendment.

The court's opinion in *Gates* gave credit to the proposition that because an informant is shown to be right about some things, he is probably right about other facts

that he has alleged, including the claim that the object of the tip is engaged in criminal activity [461 U.S. at 244]. The independent corroboration by the police of significant aspects of the informer's *predictions* [emphasis added] imparted some degree of reliability to the other allegations made by the caller.

As in *Gates*, the anonymous tip contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to *FUTURE ACTIONS OF THIRD PARTIES ORDINARILY NOT EASILY PREDICTED.* [emphasis added] [*Gates*, 462 U.S. at 245] The fact that the officers found the car matching the caller's description in front of the building, anyone could have predicted that fact because it was a condition presumably existing at the time of the call. *WHAT WAS IMPORTANT WAS THE CALLER'S ABILITY TO PREDICT RESPONDENT'S FUTURE BEHAVIOR, BECAUSE IT WITH RESPONDENT'S AFFAIRS.* [emphasis added] The general public would have had no way of knowing that respondent would shortly leave the building, get in the described car and drive in the most direct route. Because only a small number of people are privy to an individual's itinerary, it is reasonable for police to believe that a person with access to such information is likely also to have access to reliable information about the individual's illegal activities.

WHEN SIGNIFICANT ASPECTS OF THE CALLER'S PREDICTIONS WERE VERIFIED, THERE WAS REASON TO BELIEVE NOT ONLY THAT THE CALLER WAS HONEST BUT ALSO THAT HE WAS WELL INFORMED, AT LEAST WELL ENOUGH TO JUSTIFY THE STOP. [emphasis added]

ALTHOUGH IT IS A CLOSE CASE, WE CONCLUDE THAT UNDER THE TOTALITY OF THE CIRCUMSTANCES THE ANONYMOUS TIP, IS CORROBORATED, EXHIBITED SUFFICIENT INDICIA OF RELIABILITY TO JUSTIFY THE INVESTIGATORY STOP. [emphasis added]

The facts surrounding the gunpoint stop of the petitioner in this case are not even close to what is required by *Terry* and *White*. Here, there was nothing in the informant's message to indicate personal knowledge and when pressed the informant hung up. Not surprising when the informant said that the robbery was going to go down in ten minutes no robbery occurred nor did the defendant make any move to indicate that a robbery was about to be committed or that there was any evidence of "casing" the bank for possible future robbery. Significantly, *United States v. Rodriguez*, 869 F.2d 479 (9th Cir. 1989); and *United States v. Buffington*, 815 F.2d 1292 (9th Cir. 1987); there was an inordinate amount of objective facts to indicate that a bank robbery was about to take place.

In the case before the court, not only were there no indicia of reliability but there was the indicium of *un*reliability. Further, in *Illinois v. Gates, supra*, the informant's veracity, reliability and basis of knowledge are all highly relevant in determining the tip's value. The anonymous informant is in a position to show inside knowledge by predicting future activity which thus would give rise to some corroboration *vel non* of an anonymous tip.[5]

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[5] Even accepting the point that the anonymous tipster is generally least deserving of reliance, it is nowhere

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It is hard to imagine a sharper contrast. Literally none of the factors relied on by the Court to support reasonable suspicion in *Adams* and *White* are present here.

However, an even more palpable distinction that the level of *reasonable* or *founded* suspicion divides this case from *Terry* and all its progeny, including *Adams* and *White*. The central premise of *Terry* is that "criminal activity may be afoot." 392 U.S. at 30, 20 L.Ed.2d at 911. (In *Terry* itself, the ongoing "casing" of a store for an impending robbery; in *Adams*, possession of heroin.)

> "An investigatory stop must be justified by some objective manifestation that the person stopped *is, or is about to be,* engaged in criminal activity." *United States v. Cortez,* 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621, 628 (1981) (numerous cases cited' footnote omitted indicating in *dicta* that a stop can also be justified for reasonable suspicion of past criminal conduct).

Here, the robbery tip was tied to a particular bank. Whatever police actions might arguably have been justified while the defendant was *at the bank* – the police themselves evidently (and plausibly) felt no contact was warranted, since they did more than set up a surreptitious surveillance – clearly any *Terry* premise lapsed as the defendant, minding his own business, simply departed.

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convincingly argued that the matter of credibility should be reduced down to nothing more than non-anonymity in stop and frisk cases. Certainly the unremarkable fact that a man was seated in a car nearby cannot be viewed as sufficient corroboration to show reliability. LaFave, Vol. 3, p. 478.

In nonetheless gunpoint stopping the defendant as he drove away, the police seem to have been actuated by a concern that he not get away with *not* committing a crime, thereby denying them the opportunity to trawl?? for evidence. Surely, this is not what *Terry* stands for.

Of course, this was no ordinary traffic stop or *Terry* detention. The defendant was surrounded by squad cars, ordered over a bullhorn to put his hands over his head, approached with guns pointed at him and physically removed from his car by several officers while other officers occupied backup positions and positions of "cover."[6]

What, then, was the basis of this seizure of the defendant, however characterized?

A phone call of perhaps a minute's duration, in which the caller refuses to identify himself, does not even imply the source or basis of his "information," and does not hint at his connection to the person he is fingering or the crime he is predicting; the caller simply gives a cursory description of a person, describes his car and the location and claims that the person is going to rob a bank and has mysterious "explosives."

The implausibility of this tale parallels its empirical untruth: as it turned out there were no "explosives" and there was no attempted bank robbery. At the outset, is it reasonable for the police to crash through the fence of the Fourth Amendment on the thin reed of such a story where (a) the source of the story refuses to reveal himself

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[6] *United States v. Alvarez*, 694 F.Supp. 734, 736.

and exhibits none of the traditional indicia of reliability (statement against penal interest, *e.g., United States v. Roberts*, 747 F.2d 537 (9th Cir. 1984), eyewitness or victim, confidante of the person fingered, and the like) and (b) the police have no corroborative source?

Particularly as relates to the phantom "explosives," is it not significant that the caller said absolutely nothing of their nature, quantity or location? Nor did he suggest how he came to believe they were present; had he seen them, had he heard it as a rumor ten layers deep in hearsay, had he experienced a psychic vision? For that matter, what was the basis of his prognostication of a possible bank robbery? Such indicia of reliability are entirely absent. Any paranoid, any schizophrenic, any jealous husband or complete stranger could have furnished exactly this same "information" to the police.

And what of the police "corroboration"? They confirmed that the defendant was sitting in a white Mustang in a bank parking lot. Nothing more. It is settled that skeletal, easily observed, innocent activities provide *no corroboration* whatsoever where the informant is of untested reliability (let alone, as here, anonymous). *See Larkin, supra.*

The Fourth Amendment was conceived, and its jurisprudence has evolved, to protect the law-abiding majority, not the law-breaking minority, from unwarranted police intrusions.

> "Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed that common rumor or report, suspicion, or even strong reason to

> suspect was not adequate to support a warrant for arrest." (*Dunaway, supra,* 442 U.S. at 213, 60 L.Ed.2d at 836.

One can readily hypothesize an innocent person sitting in his car in a parking lot, resting from a long drive, waiting for a store to open or with any one of myriad other innocuous purposes (or no purpose at all); or a person on foot waiting on a street corner for a friend or out walking his dog.

Could someone, for spite or prank, subject such an innocent person to a "felony stop" (or even an ordinary *Terry* stop) and incident frisk simply by making an anonymous call to the local police describing the person and claiming that he was about to commit some made-up crime?

Could someone in a phone booth legitimize a nonconsensual and warrantless vehicle search by the bare expedient of describing to the police a car he was at that moment observing for the first time in his life and claiming it contained "explosives"?

Manifestly, the salient element in such situations is that the tipster is anonymous: not merely anonymous in the sense of a "confidential informant" known to the police but whose identity the law suppresses for his safety, but truly anonymous. Naturally, such persons are routinely viewed as inherently less reliable.

With a view to precluding the evils suggested by the situations just hypothesized, and thus to give substance rather than merely form to the Fourth Amendment, considerable law has developed on anonymous tips, culminating in *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317,

76 L.Ed.2d 527 (1983), and *Alabama v. White* (1990) 89-789, ___ U.S. ___.

While *Gates* involved a challenge to a seizure predicated on a warrant, its reasoning and holding are equally, indeed *a fortiori*, applicable to warrantless seizures as here. The Court concluded that probable cause existed in such circumstances. Although the tipster was anonymous, the sheer amount of corroborated detail bespoke his status as an insider or at least someone close to the suspects. By contrast, such detail is utterly lacking in this case.

Seemingly even more important to the Court in *Gates*, the tipster accurately predicted *future* ostensibly innocent actions by the suspects, further evidencing his commensurate intimacy with them. Here, no such indicium of reliability obtains; the only prediction was perpetration of the putative crime itself, and it never happened.

Justice Rehnquist declared in *Gates*:

> "Finally, the anonymous letter contained *a range of details* relating *not just to easily obtained facts and conditions existing at the time of the tip*, but to *future actions of third parties ordinarily not easily predicted*. The letterwriter's accurate information as to the travel plans of each of the Gateses was of a character likely obtained only from the Gateses themselves, or from someone familiar with their not entirely ordinary travel plans. . . . It is enough that *there was a fair probability that the writer of the anonymous letter had obtained his entire story either from the Gateses or someone they trusted*." 462 U.S. at 245-46, 76 L.Ed.2d at 552-53 (emphasis added).

Here, nothing of the sort. The courts, for instance, have viewed evidence that the tipster has been in the physical presence of the suspect as an indicium of reliability. See *Gates, supra,* 462 U.S. at 234; *Fixen, supra,* 780 F.2d at 1438. What, then, of the failure by the caller in this case to provide any description of the suspect's clothing despite prompting by the police?

Thus, only on account of a mass of detailed and accurate information, Particularly involving as it did correct predictions of specific future actions by the suspects, could the tipster in *Gates* be credited as adequately reliable. "It is enough, for purposes of assessing probable cause, that corroboration through other sources of information reduced the chances of a reckless or prevaricating tale, thus providing a substantial basis for crediting the hearsay." 462 U.S. at 244-45, 103 S.Ct. at 2335, 76 L.Ed.2d at 552 (citation omitted).

How by the nature of the tip here, in its surrounding circumstances, could one be confident, as in *Gates,* that it could not really be a "reckless or prevaricating tale"? Present facts, observed *Gates,* are "easily obtained." 462 U.S. at 245. What indicia even approaching *Gates* are there to negate the scenario of someone spotting a white Mustang innocently parked near a bank and ducking into a pay phone to report a makebelieve incipient bank robbery (to go with the makebelieve "explosives")? Some people derive a thrill from phoning in false fire alarms; other perhaps enjoy triggering police actions.

In sum, whether viewed as a pure arrest subject to probable cause or, artificially, as a highly intrusive variant of a *Terry* stop, subject to commensurately stringent

reasonable suspicion (and which almost instantaneously ripened, in any event, into arrest), the seizure of the defendant rests for its lawfulness solely on the frail foundation of one brief and cryptic anonymous phone call.

The principles subsumed in the Fourth Amendment are far too weighty for such a puny foundation. The Circuit Court's majority opinion is a clear deviation from past Ninth Circuit cases and is not in conformity with *Terry, Adams* and *White. Adams, Gates* and *White* clearly require more than a recitation of easily obtainable innocent activities. There must be something to show that the tipster possessed inside knowledge. The majority of the Ninth Circuit in this case relied upon two D.C. Circuit cases which upon analysis support the bare conclusion that innocent activities can corroborate an anonymous informant's tip but ignores that the innocent activities are such that should give an indicia of reliability to the tipster over and beyond easily ascertainable details of a person at a location in a given car.

United States v. White, 648 F.2d 29 (D.C. Cir. 1981), was a case in which the Court struggled to support the detention and subsequent search. There was an anonymous tip predicting future narcotic activity. The information was significantly detailed which gave rise to information indicating personal knowledge and the surveillance was verified in every detail except for the actual possession or exchange of narcotics. In petitioner's case, there were not details as to the *modus operandi* to indicate that the anonymous tipster had specific inside knowledge, and, therefore, would have a greater quantum of reliability. The majority opinion confuses innocent activity, corroboration, and information that can be obtained

without any difficulty with accurate prediction of future activity as indicated in *Illinois v. Gates, supra; Adams v. Williams, supra; Alabama v. White, supra.*

In addition, majority relied on *United States v. McClinnhan,* 660 F.2d 500 (D.C. Cir. 1981), which is a cryptic opinion of undisputed facts where officers received an anonymous call that a black man wearing jeans, a black coat and a black hat, carrying a sawed off shotgun concealed in a black briefcase would be at a specific location in the District of Columbia. A minute later, the officers reached the area and saw a man fitting that precise description with a black briefcase. One officer approached the defendant while the other officer seized the briefcase and opened it up observing a loaded shotgun. The case discussed investigative detention quoting *Terry v. Ohio, supra.* Actually in *McClinnhan,* there was a search of a briefcase that occurred simultaneously with the confrontation of the defendant. No Ninth Circuit nor United States Supreme Court case has ever gone as far as *McClinnhan.* Hopefully, no court will.

If this case is allowed to stand, the message to the District Court is, as in *McClinnhan,* a black man, or in *Alvarez,* "a kinda Mexican looking" man on a street corner in broad daylight [or in a car], may be frisked at gunpoint based upon an anonymous call unsupported by personal observations or evidence of past, present or future criminal conduct, even if the observed conduct contradicts the information provided by an informant and that the information is patently false. Thus, there would be no Fourth Amendment protection against a vengeful or dangerous informant desiring to use law

enforcement for their own evil purpose, possibly even to have their target slain.[7]

If, as discussed above, the flimsy tip in this case does not rise to the level even of reasonable suspicion justifying a felony stop, surely it does not constitute probable cause for a plenary automobile search.

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[7] District Court opinion (p. 737) states: "Regardless of whether lawfulness of the search in question is to be tested on the basis of probable cause or reasonable suspicion, therefore, the search in question was unlawful because it cannot meet either test. Anyone can make an accusation. Anonymous accusations can be made with impunity. Anyone, including the police, can make an anonymous and unidentified phone tip. If the exclusionary rule were not applied to the facts in this case, there would be nothing to stop a police officer who wished to search any person in the hope of finding evidence of a crime from making an anonymous phone call to his own or some other police department, identifying and locating the person to be searched, and accusing him of committing or about to commit some crime. A gunpoint stop cannot be justified on the basis of anonymous and unidentified bald accusations, where nothing else the police observe gives any reason to believe a crime is being, has been or is about to be committed. In such circumstances, there can be neither probable cause nor reasonable suspicion which would justify the gunpoint stop and search.

VI.

CONCLUSION

This case is important to establish what the law is going to be as far as the extent of gunpoint stops from an anonymous tipster. Clearly, there is no bright line rule set out by the Supreme Court of the United States except that there must be more than that which is shown in this case. True, innocent details can supply that. But those innocent details must be woven into some facts that would indicate that the anonymous tipster had some personal inside information by predicting future activity. *Illinois v. Gates, supra; Alabama v. White, supra.* In this case, not only were there no innocent details that would indicate personal knowledge or trustworthiness of the informant, but the facts observed proved the informant untrustworthy. The bald statement that innocent details can supply corroboration without more in effect eviscerates the Fourth Amendment protection regarding anonymous tipsters and undoubtedly will create chaos if this case is allowed to stand.

It is true as the District Court has stated in substance that he would like to find the defendant guilty but that the Court's adherence to constitutional principles are superior to the personal desire to lock up a "bad guy." All those trained in the law have often heard the statement that hard cases make bad law. The Ninth Circuit opinion became final before the United States Supreme Court's decision in *Alabama v. White, supra,* and as a result it is not empowered to rectify its conclusion following the D.C. Circuit cases where innocent details alone showing no

prediction of past, present or future criminal activity is sufficient to make a gunpoint detention.

WHEREFORE, for the foregoing reasons, JACK MANUEL ALVAREZ, JR., respectfully requests that this Court grant his Petition for Writ of Certiorari or, in the alternative, remand this case to the Ninth Circuit for reconsideration in light of *Alabama v. White, supra.*

Respectfully submitted this 27th day of August, 1990.

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant,* v. JACK MANUEL ALVAREZ, JR., *Defendant-Appellee.*	No. 88-5304 D.C. No. CR-88-0035-JSL OPINION

Appeal from the United States District Court
for the Central District of California

J. Spencer Letts, District Judge, Presiding

Argued and Submitted
May 4, 1989 – Pasadena, California

Filed March 20, 1990

Before: Joseph T. Sneed, Stephen Reinhardt and Melvin Brunetti, Circuit Judges.

Opinion by Judge Brunetti; Dissent by Judge Reinhardt

COUNSEL

Thomas J. Umber, Assistant United States Attorney, Santa Ana, California, for the plaintiff-appellant.

Marshall M. Schulman, Santa Ana, California, for the defendant-appellee.

OPINION

BRUNETTI, Circuit Judge:

Appellee, Jack Manuel Alvarez, was indicated in a three-count indictment charging him with possession with intent to distribute cocaine (21 U.S.C. § 841(a)(1)), possession of an unregistered firearm (26 U.S.C § 5861(d)), and possession of a firearm with the serial number removed (26 U.S.C. § 5861(h)). Appellant contends that the district court erred in suppressing evidence seized after a stop of Alvarez' automobile.

Background

On May 12, 1988, at approximately 10:28 am, an unidentified male caller telephoned the Santa Ana Police Department with information of a possible bank robbery that was to take place that morning. The caller refused to identify himself but claimed that the robbery was going to happen "in about 10 minutes at the Bank of America on Eighth and Main. The man is driving a white Mustang GT and he's got explosives with him." The caller described the man in the car as "tall dark, looks kinda Mexican and he's probably in the back of the bank." When asked how he knew what was going to happen, the caller stated, "I know it's going to happen. Just believe me, he's there."

Based on this information, several patrol cars were dispatched to the bank. Officers observed a white Mustang GT backed into a parking space facing the bank with a Hispanic looking male occupant. The officers observed

the car for about five minutes. According to the government, "[a]s other police officers arrived at the bank, one of the police cars drove past the bank, within Alvarez' field of vision," after which the white Mustang GT left the parking lot. The police followed the car for a short distance and then pulled it over. One of the officers, using his public address system, ordered the suspect not to move and to keep his hands in plain view. Three officers approached Alvarez with their weapons drawn, and ordered him out of the car. Alvarez complied with all of the officer's instructions. While placing Alvarez' arm behind his back, one of the officers observed a bulge underneath Alvarez' jacket and removed a loaded nine millimeter pistol from the suspect's right side. Alvarez was handcuffed and a pat down search revealed another loaded nine millimeter pistol and two ammunition clips. The police then searched the trunk of the car and found a partially assembled belt-feed M-6 machine gun, a M-16 fully automatic rifle, ammunition for both of these weapons, and a substantial quantity of cocaine.

At the hearing on the motion to suppress the evidence found in the trunk, the anonymous caller was identified as Michael Soler, a personal acquaintance of Alvarez. At the time Soler made the call he was on bail awaiting trial in San Bernardino on charges of the sale and transportation of cocaine. Soler, at the hearing testified he had spent the morning with Alverez on the day Alvarez was arrested. Soler testified he was going shopping at South Coast Plaza that day, but that, although out of his way, he followed Alvarez to the bank. When Alvarez turned into the bank, Soler went directly to a phone booth and called the police. Soler also testified that

he was not working for the police officer when he made the call. The district court ruled that Alvarez had not met his burden of proof that Soler was acting at the behest of the government and that the motion to suppress could not be granted on that ground.[1]

In granting Alvarez' motion, the district court concluded that it did not need to address the issue of whether the stop was an arrest because under either a test of probable cause or reasonable suspicion the stop was unlawful.[2] The government appeals, and we now reverse.

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[1] The district court troubled by evidence that Soler was working with law enforcement officers to create the appearance of reasonable suspicion to justify the initial stop and subsequent seizure. The court noted that evidence suggested that Modesto Perales, an ex-police officer, may have been the source of cocaine for both Soler and Alvarez. Further, the court noted that its own docket contained a three count indictment against Perales for possession with an intent to distribute and distribution of cocaine. The court states that, if in fact, in cooperation with the United States, Soler had induced Alvarez to go and wait at the bank with cocaine and weapons, and then made the 'anonymous' telephone call, a motion to suppress would have been granted; if it were not necessary to suppress the evidence on other grounds, the district court concluded that it would be inclined at least to invite more evidence on the question.

[2] A gunpoint stop cannot be justified on the basis of anonymous and unidentified bald accusations, where nothing else the police observe gives any reason to believe a crime is being, has been or is about to be committed. In such circumstances, there can be neither probable cause nor reasonable suspicion which would justify the gunpoint stop and search.

The importance of this issue should not be minimized. The more broadly the law construes the duty of police officers to

(Continued on following page)

Standard of Review

Whether there was sufficient founded suspicion to justify an investigatory stop is a mixed question of law and fact that requires a de novo review. *See United States v. Thomas*, 863 F.2d 622, 625 (9th Cir. 1988) (*Thomas*). Whether an arrest has occurred depends on all the surrounding circumstances and whether, under all the circumstances, "a reasonable person would conclude he was under arrest." *United States v. Patterson*, 648 F.2d 625, 632 (9th Cir. 1981) (internal citations omitted); *see also, United States v. Buffington*, 815 F.2d 1292, 1300 (9th Cir. 1987) (*Buffington*). Whether a search was lawful presents a mixed question of law and fact reviewable de novo. *United States v. Linn*, 862 F.2d 735, 739-40 (9th Cir. 1988); *see also, United States v. McConney*, 728 F.2d 1195, 1204-05 (9th Cir. 1984), *cert. denied*, 469 U.S. 824 (1984).

Discussion

A. *Validity of the Investigatory Stop*

The government's first challenge to the district court's ruling to suppress the evidence is that the initial

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(Continued from previous page)

investigate suspicious circumstances and their right to do so with drawn weapons, the more likely it becomes that innocent persons will die or be seriously injured. Anytime two people confront each other with weapons drawn, there is a great risk that one or both will shoot. Because the likelihood of tragedy is so high when armed confrontations become necessary, it is of the utmost social importance to clearly and narrowly define the occasions which call for such highly volatile confrontations."

District Court's Memorandum and Order granting defendant's motion to suppress at 8-9.

detention of Alverez' vehicle was legal. Specifically, the government maintains that the officers' detention of Alvarez was based upon a reasonable articulable suspicion of illegal activity.

In order to justify an investigatory stop there must be "some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *United States v. Cortez*, 449 U.S. 411, 417 (1981); *Terry v. Ohio*, 392 U.S. 1 (1968); *Thomas*, 863 F.2d at 625. The stop is evaluated by looking at the "totality of the circumstances" and then determining, based upon the whole picture, whether the detaining officers had a particularized an objective basis for suspecting the particular person of criminal activity. *Cortez*, 449 U.S. at 417-18.

The question here is whether the anonymous tip was sufficiently corroborated by police observations to provide the officers with reasonable suspicion to warrant an investigatory stop. We assume that the tipster was not working with law enforcement officers to create the appearance of reasonable suspicion by which the stop and subsequent search might be justified.[3]

In *Illinois v. Gates*, 462 U.S. 213 (1983), the Supreme Court, in deciding the weight of an anonymous informant's tip, applied a "totality-of-the-circumstances" analysis, requiring a balance assessment of the relative weight of all the "indicia of reliability." *Gates*, 462 U.S. at 235. In *Gates*, the details of an anonymous informant's letter

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[3] At oral argument, the appellee's counsel stated that he did not want us to address the issue of the tipster being associated with the government.

were corroborated by police observation. The Supreme Court reasoned that the inherently suspect nature of an anonymous tip was diminished by independent corroboration by police of the letter's predictions of future activities of the suspect. *Gates*, 462 U.S. at 244-45.

The D.C. Circuit has held that an anonymous tip can provide sufficient reasonable suspicion when the tip "was corroborated in every significant detail by [the police officer's] pre-stop surveillance." *United States v. McClinnhan*, 660 F.2d 500, 502 (D.C. Cir. 1981) (*McClinnhan*); *see also United States v. White*, 648 F.2d 29 (D.C. Cir.), *cert. denied*, 454 U.S. 924 (1981).

In *McClinnhan*, the police were given a detailed description of the suspect and told that he had a sawed-off shotgun in a brief case. The police spotted a man fitting the description standing with a brief case. The police approached the man an initiated an investigatory detention and weapons frisk. They also conducted a warrantless search of the brief case which was next to the man.

The court noted "that it is possible for anyone with a grudge a fabricate a tip whose neutral details, such as clothing or location, would provide the [necessary] corroboration . . . for a stop." *McClinnhan*, 660 F.2d at 503. Nonetheless, the court held that the officers' suspicions about the suspect, based on an anonymous tip that, while lacking facial indicia of reliability, was corroborated in every significant detail by the officers' pre-stop surveillance, justified an investigative detention of the suspect.

Reviewing the facts and surrounding circumstances of this case from the perspective of an experienced law

officer, we conclude that the initial warrantless stop was proper because the officers had a reasonable suspicion that Alvarez was involved in criminal conduct. *See Thomas*, 863 F.2d at 626-27; *United States v. Sutton*, 794 F.2d 1415, 1426 (9th Cir. 1986) (*Sutton*). Here, the officers, through an anonymous tip, were informed that a "tall, dark [male who] looks kinda Mexican" in a "White Mustang GT" was parked in back of the bank and was going to rob the bank. The police were also informed that the man had explosives. The police officers observed Alvarez sitting in a vehicle which fit the description given by the anonymous tipster. The vehicle was parked in the bank's parking lot and was unusually positioned – front end facing outward. The first police officer to arrive on the scene observed the car and its occupant for approximately five minutes; two other marked police units appeared on the scene. The appellate did not depart from the bank until one of these two marked police cars drove within the appellee's line of sight.

"When law enforcement officials corroborate the details of an anonymous informant's tip, the tip can give rise to a reasonable articulable suspicion." *United States v. Rodriguez*, 835 F.2d 1090, 1092 (5th Cir. 1988) (*Rodriguez – Fifth Circuit*). Here, the officers verified each of the details of the tip. These facts were consistent with the actions of a would-be bank robber who decided to take a break until the coast was clear. The anonymous tip, corroboration of the details of the tip, and the pre-stop observations of the police officers gave rise to reasonable articulable suspicion to make an investigatory stop. The "Fourth Amendment does not, particularly where the reported contraband [is explosives], require a police officer to ignore his

well-founded doubts and accordingly will permit an investigatory detention." *Id.* at 503.

Alvarez argues that the activities observed by the police officers are innocent and not probative of criminal activity. "Taken alone he might be correct. But when viewed in light of the tip and other circumstances noted above, this same activity appears highly suspicious. It is not uncommon for seemingly innocent conduct to provide the basis for [reasonable suspicion]." *United States v. Rodriguez,* 869 F.2d 479, 483 (9th Cir. 1989) (*Rodriguez – Ninth Circuit*) (citing *Gates,* 462 U.S. at 244 n.13); *see also Sutton,* 794 F.2d at 1427. The fact that the officers "did not actually observe any criminal activity is irrelevant," as is the fact that Alvarez could have been at the bank for innocent purposes. *Sutton,* 794 F.2d at 1427. We hold that under the circumstances of this case the officers had a particularized and objective basis for making the investigatory stop of Alvarez' vehicle.

B. *Validity of the Manner of the Investigatory Stop*

After stopping the vehicle, one of the police officers immediately ordered Alvarez not to move and to keep his hands in view. The officers then approached the vehicle with their weapons drawn and ordered Alvarez to step out of the vehicle. Appellant argues that the investigatory stop escalated to a full arrest when he was forced to exist his car at gunpoint necessitating a showing of probable cause.

The Supreme Court has permitted limited instrusions on a suspect's liberty during a *Terry* stop to protect the

officer's safety; a police officer may take reasonable measures to neutralize the risk to physical harm and to determine whether the person in question is armed. *United States v. Hensley*, 469 U.S. 221, 235 (1985); *Terry*, 392 U.S. at 24. In this circuit it has been held that "[t]he use of force does not convert the [investigatory] stop into an arrest if it occurs under circumstances justifying fears of personal safety." *Buffington*, 815 F.2d at 1300 (*Terry* stop where police offices forced suspects to exist care and lie down on pavement at gunpoint); *accord United States v. Parr*, 843 F.2d 1228 (9th Cir. 1988) (briefly placing suspect in police car does not convert a *Terry* stop into an arrest requiring probable cause). *See United States v. Greene*, 783 F.2d 1364, 1367-68 (9th Cir.), *cert. denied*, 476 U.S. 1185 (1986) (*Greene*) (investigatory stop where officers instructed suspects to put their hands on the car and then drew their weapons); *United States v. Taylor*, 716 F.2d 701, 708 (9th Cir. 1983) (*Taylor*) investigatory stop where officers approached suspects with their weapons drawn after having been warned that the suspects were dangerous).

In this case, the totality of the circumstances indicate that the police conducted an investigatory stop rather than an arrest without probable cause. The police, through their independent observations, verified the details of the anonymous tip. After corroborating the details of the tip, including the suspect's location, description and vehicle, the police officers had additional reason to credit the portion of the tip that indicated the suspect was carrying explosives. "Although approaching a suspect with drawn weapons are extraordinary measures, such police procedures [are] justified . . . as a reasonable means of neutralizing danger to police and

innocent bystanders." *United States v. Taylor*, 857 F.2d 210, 214 (5th Cir. 1988); *United States v. Serna-Barreto*, 842 F.2d 965, 968 (7th Cir. 1988) (*Terry* stop does not turn into an arrest as soon as an officer points his gun at the suspect); *Taylor*, 716 F.2d at 708. In *Taylor* the officers had been warned that the suspects were dangerous and approached the suspects' vehicle with weapons drawn. We held that "[w]hen the officers stopped [the suspects] to question them . . . the officers were justified in drawing their weapons in self protection," and the officers' drawn weapons did not convert the *Terry* stop into an arrest. *Taylor*, 716 F.2d at 708-09.

Contrary to appellee's contentions, *United States v. Strickler*, 490 F.2d 378 (9th Cir. 1974), does not require a different result. In that case, we held that an armed approach to a surrounded vehicle was an arrest. In *Strickler*, "it is clear that . . . the police had no legitimate fear for their safety and only tenuous reasons to believe that the occupants of the car were involved in the drug transaction." *Taylor*, 716 F.2d at 708-09. In the present case, the police officers had strong reason to believe that Alvarez was armed with explosives and legitimate reasons to fear for their safety. We hold that the manner of the stop did not convert the investigatory stop into an arrest.

C. *Validity of the Frisk*

The decision to frisk Alvarez for weapons was similarly justified. "Police are entitled to take steps to assure that the person stopped is not armed." *Greene*, 783 F.2d at 1368. "The purpose of the *Terry* frisk is 'to allow the

officer to pursue his investigation without fear of violence.' " *United States v. Bautista*, 684 F.2d 1286, 1289 (9th Cir. 1982), *cert. denied*, 459 U.S. 1121 (1983) (quoting *Adams v. Williams*, 407 U.S. 143, 146 (1972)). In this case, the corroborated details of the anonymous tip noted by the officers allowed them to form the reasonable suspicion that Alvarez was armed with explosives. Additionally, when the officers placed Alvarez' arm behind his back they observed a large bulge underneath his jacket. The visible bulge was a significant factor in clueing in the officers to Alvarez' possession of a gun. It was thus reasonable for the officers to take the precautionary step of a pat frisk to insure that Alvarez was not armed. We conclude that the officers acted properly in frisking Alvarez.

D. *Validity of the Search of the Vehicle*

The next question is whether the officers' warrantless search of Alvarez' automobile including the trunk was proper. Due to an automobile's mobility, a search warrant does not need to be obtained prior to a search of the automobile. However, the search must still be supported by probable cause. *California v. Carney*, 471 U.S. 386, 394-95 (1985); *United States v. Miller*, 812 F.2d 1206, 1208 (9th Cir. 1987). Officers who have probable cause to believe that an automobile contains evidence of a crime may search the vehicle, including the trunk and all containers in which there is probable cause to believe that evidence was concealed. *United States v. Ross*, 456 U.S. 798 (1982). Probable cause exists if, under the totality of the circumstances, "there is a fair probability that contraband

or evidence of a crime will be found in a particular place." *Rodriguez – Ninth Circuit*, 869 F.2d at 484.

In this case probable cause existed to search the vehicle. The pat frisk revealed two loaded nine millimeter pistols inside the appellee's waistband. The moment the police discovered the two concealed weapons, they had reason to believe that Alvarez was involved in the criminal activity described by the tipster and they were provided with additional reason to suspect that Alvarez possessed explosives. The verified details of the anonymous tip "coupled with [the officers'] experience gave rise to probable cause to believe the car and trunk contained contraband." *Rodriguez – Fifth Circuit*, 835 F.2d at 1093.

In the officers' search of the car, two large black bags and a long beige box were found inside the trunk. These containers could easily conceal explosives; additionally, the officers observed a barrel of a rifle protruding from one of the bags. These circumstances justify the officers' search of the bags and box in the trunk.

Conclusion

Accordingly, we reverse the district court's decision to suppress the evidence found in the trunk. The case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

REINHARDT, Circuit Judge, dissenting:

I dissent. This is a particularly intriguing case because and anonymous tip that was false – and patently

manufactured out of whole cloth in at least one crucial respect – resulted in the seizure of evidence that led to the defendant's conviction for an entirely unrelated offense. Because the tip was false, the police could not obtain corroboration of any of its details, other than of wholly neutral facts that failed to suggest the existence of any criminal activity, planned or otherwise.[1] Yet, the majority holds that the police had founded suspicion sufficient to justify a number police officers' drawing their weapons, stopping an individual at gunpoint, immobilizing him, and then frisking and questioning him. By finding that the wholly innocuous facts observed by the police provided sufficient corroboration for an anonymous tip, and justified the use of force that ensued, the majority lowers even further the constitutional barriers that separate a free society from a police state.

The district court framed the central question in this case as "whether the police can lawfully stop a vehicle or

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[1] Another unusual aspect of this case is that the "anonymous" caller eventually became known, and in fact testified at the suppression hearing. The district court characterized the informant's testimony as follows: "Soler's testimony that he called the police out of a sense of civil responsibility was not credible. Nothing in his testimony revealed any reason for him to believe that Alvarez was about to rob the bank." Moreover, Soler's testimony makes it absolutely clear that he had no information whatsoever suggesting that Alvarez had any explosives. Soler's refusal to reveal the basis for his allegations to the police dispatcher prevented the police from learning that the tip was, at least in most significant respects, Soler's invention – a compelling argument for the importance of ascertaining the basis of an informant's knowledge before relying on such an intrinsically unreliable source. See pages 2928-29 *infra*.

person with their guns drawn, acting solely on the basis of an anonymous phone call properly identifying where the person could be found, without any supporting evidence that a crime is being, has been, or is about to be committed." In actuality, this is not one question but several, with which this court has struggled for years. Among them are two that we must address today: Under what circumstances may police rely on an anonymous tip to form reasonable suspicion for an investigatory stop?[2] What degree of corroboration will establish the reliability of an anonymous tip?

Our struggle with these issues has been complicated by the fact that in many respects the answers are fact-specific and, thus, resistant to the development or application of general principles. Still, our prior decisions and those of the Supreme Court have frequently noted the intrinsic unreliability of anonymous tips. It follows that law enforcement officials must corroborate such tips in significant detail before their reliability can be properly established. Because I do not believe that Santa Ana police corroborated the anonymous tip at issue here in any significant detail, I conclude that they lacked reasonable suspicion to stop Alvarez.

I

Under the principle of *Terry v. Ohio*,[3] " '[a]n investigatory stop must be justified by some objective

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[2] The Supreme Court recently granted certiorari in order to address this issue in *Alabama v. White*, 58 U.S.L.W. 3443, 3449 (U.S. Jan. 16, 1990) (No. 89-789).

[3] 392 U.S. 1 (1968).

manifestation that the person stopped is, or is about to be, engaged in criminal activity.' " *United States v. Thomas*, 863 F.2d 622, 625 (9th Cir. 1988) (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)). The lawfulness of the stop depends upon whether the totality of the circumstances, as they existed "at the time the officer initiate[d] the stop," *Thomas*, 863 F.2d at 625, constitutes "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Cortez*, 449 U.S. at 417-18. Under this totality-of-the-circumstances test, the anonymous tip upon which the police relied was insufficient to provide reasonable suspicion to stop Alvarez.

Both the Supreme Court and this court have indicated that anonymous telephone tips are the least reliable source of information. *See Illinois v. Gates*, 462 U.S. 213, 233-34, 237-38 (1983); *Adams v. Williams*, 407 U.S. 143, 146-47 (1972); *United States v. Sierra-Hernandez*, 581 F.2d 760, 763 (9th Cir.) (per Kennedy, J.), *cert. denied*, 439 U.S. 936 (1978). However, the Supreme Court has held that an anonymous tip may serve as the basis for probable cause where, in light of the totality of the circumstances – including the extent of detail in the tip and police success in corroborating that detail – the police can establish its reliability and the veracity of the anonymous informant. In *Gates*, the informant accurately predicted the conduct of the defendants, describing in detail their unusual travel plans and the *modus operandi* of the criminal activity they would be engaged in. Through surveillance, the police confirmed that the defendants travelled to a location where the drug trade was particularly active. They confirmed that the defendants followed a travel route

frequently employed by drug couriers. And they confirmed the suspicious travel arrangements predicted by the anonymous informant. The confirmation of those details established the reliability and personal knowledge of the informant and provided probable cause for the police to search the defendants' property for narcotics.

While there are many distinctions between *Gates* and the present case,[4] the key distinction for our purposes is that here the police could not verify any significant detail of the anonymous tip, and certainly not the allegation that Alvarez planned to rob a bank or that he was carrying explosives. While under police surveillance, Alvarez engaged in no behavior that would suggest that he planned a bank robbery and made no moves that would indicate he was armed. He was observed parked in a bank parking lot for five minutes, as if waiting for someone – possibly the anonymous tipster. That is the only conduct the police observed.[5] He made no move to enter

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[4] *Gates* is a probable cause case and not a reasonable suspicion case. The degree of corroboration of details required for reasonable suspicion is undoubtedly less than that required in *Gates*. But as the discussion in the text will make clear, the tip in this case involved almost no details and could be corroborated only in the slightest degree. And the details that could be corroborated did not suggest that the suspect was engaged in any criminal activity.

[5] The Government claims that Alvarez was parked in an unusual manner, as if planning a getaway. However, the record shows only that Alvarez's car was "backed into a parking place, facing the bank." The record does not show the distance between the car and the entrance to the bank; it does not show the distance between the car and the exit from the parking lot;

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the bank, and while parked in the lot he did nothing to indicate that a bank robbery was about to commence or that he was awaiting further events before proceeding with criminal conduct. After several minutes, he drove out of the lot without engaging in any suspicious activity whatsoever,[6] and when police stopped him shortly

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it does not show whether the driver's side or the passenger's side of the car was closer to the bank; it does not show whether the position of Alvarez's car in the parking space might as easily have resulted from Alvarez pulling forward into his space from the space behind it, as people often do; it does not show whether some or even all of the other cars in the parking lot were parked in a manner similar to Alvarez's. In short, the record does not support the Government's claim.

The mere fact that Alvarez was parked with the front end of his car facing out of the parking space and toward the bank is not by itself unusual, let alone suggestive of a planned getaway. In fact, an informal survey of the judges' parking lot in the federal courthouse in Los Angeles on a typical Friday afternoon revealed more than one car which, on the Government's theory, was parked in a manner that suggested that the driver was planning a fast getaway after perpetrating some form of mischief.

[6] The Government vaguely suggests some causal relationship between a police car's arrival and Alvarez's departure, and the majority seems uncritically to accept this version of events. However, the record fails to establish that Alvarez's exit was precipitated by the appearance of the police car, or even that Alvarez saw it drive by. While the record is not clear on this point, the Government's argument below was merely that such a connection was "quite possible, maybe even probable." This possibility was never supported by anything more than counsel's suggestion, made only after Judge Letts had tentatively ruled against the Government. Indeed, the written

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thereafter, they had received no information or reports indicating that a robbery had been attempted. In short, everything about Alvarez's conduct suggested that he had not robbed a bank, was not engaged in a bank robbery, and did not intend to rob a bank. The allegation that Alvarez was carrying explosives also proved ultimately to be untrue.[7]

Thus, the police could not corroborate any significant detail about Alvarez's conduct before stopping him; their anonymous telephone informant's reliability extended only to his ability to offer a description of an individual sitting in his car in a public place. This falls far short of the corroboration deemed sufficient in *Gates*, which the Supreme Court described as a "range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted." 462 U.S. at 246. Surely,

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declarations of the officers on the scene all suggest that Alvarez may have waited as long as five minutes after the appearance of the vehicle before leaving the parking lot. The district court found that "[i]nstead of getting out of his car and approaching the bank or otherwise acting in a manner consistent with an intent to rob the bank, Alvarez *simply left* the bank parking lot" (emphasis added). Under these circumstances, any inference that Alvarez was fleeing from police surveillance is entirely unwarranted, and thus, provides no basis for placing any faith in the anonymous allegation that Alvarez was planning to rob the bank.

[7] Although the absence of explosives was confirmed only after the stop occurred, police knew before they stopped Alvarez that he had not engaged in a bank robbery.

even under the lesser *Terry* standards, reasonable suspicion must be founded upon more than an accurate description of an individual's *present* location and appearance, especially where the allegations of his *future* criminal conduct are called into question by surveillance. In this case, the anonymity of the informant and the inability of the police to corroborate any significant details of his tip preclude any finding that the police had any particularized or objective basis for suspecting Alvarez of criminal activity. *Cortez*, 449 U.S. at 417-18. Because the police had no reasonable suspicion that Alvarez was engaged in or planning to engage in criminal activity, the stop and subsequent searches of Alvarez and his car were illegal under *Terry*.

The majority's discussion of the tip's corroboration – without which the tip is admittedly unreliable – is deficient in three respects. First, the majority asserts that "the officers verified each of the details of the tip." In fact, the officers verified only the fact that a man meeting the anonymous caller's description was indeed parked in, of all places, a parking lot; the *significant* details of the tip were actually called into question by police observation.

Second, the majority asserts that the facts observed by the police "were consistent with the actions of a would-be bank robber who decided to take a break until the coast was clear." Yet even if the facts were as the majority claims – and they are not[8] – *Terry* demands a higher standard. Reasonable suspicion does not exist whenever a citizen's actions are merely *consistent with* the

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[8] See notes 5 and 6 *supra*.

actions of a *would-be* criminal. The majority correctly points out that police need not directly observe criminal activity, but it ignores an important corollary emphasized by the Supreme Court in *Gates:* "In making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of *suspicion* that attaches to particular types of non-criminal acts." 462 U.S. at 243-44 n.13 (emphasis added). Clearly, behavior does not become suspicious simply because the police are told about it. However, in deciding that the conduct observed by the Santa Ana police adequately corroborated the anonymous tip, the majority fails to indicate a single detail or combination of details that would be suspicious *in the absence of a tip.* This circular manner of analyzing the tip makes it essentially self-corroborating, even though the information supplied by the caller here could have been supplied by anyone within sight of Alvarez at the time, or anyone who had told Alvarez to meet him at the lot.[9]

Third, the majority sums all of this up by stating, "The anonymous tip, corroboration of the details of the tip, and the pre-stop observations of the police officers

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[9] We need not decide what the result would have been if Alvarez had actually sought to enter the bank, and I express no opinion on that hypothetical question. However, any such case would at least involve a *prediction of future conduct – i.e.,* some conduct on Alvarez's part that was predicted by the informant and was not observable by the general public at the time of the informant's telephone call. In this case, the anonymous tip described only the current state of affairs in a public place. The *future* conduct, Alvarez's departure from the parking lot, tended to undermine rather than support the reliability of the tip.

gave rise to reasonable articulable suspicion to make an investigatory stop." Yet the anonymous tip, which contained no indicia of inherent reliability, was entitled to no weight unless corroborated in significant detail, and police surveillance tended to contradict more significant details than it corroborated.

No prior decision of this court has ever credited an anonymous tip with so little corroboration. The majority cites *United States v. Rodriguez*, 869 F.2d 479, 483 (9th Cir. 1989), for the proposition that "seemingly innocent conduct" can provide reasonable suspicion. However, the "seemingly innocent conduct" observed by police in *Rodriguez* involved a number of suspicious details, including large stacks of currency, frequent trips to the airport, and "evasive driving." 869 F.2d at 483. Moreover, there were actually *two* anonymous tips in *Rodriguez*, one of which had already been corroborated when a consensual search of an apartment turned up $140,000 to which a narcotics dog later alerted; and these two tips were supplemented by a third tip from a *known* informant, as well as information obtained from other narcotics officers. *Id.* at 482-83. The majority's citation of *United States v. Thomas*, 863 F.2d 622 (9th Cir. 1988), and *United States v. Sutton*, 794 F.2d 1415 (9th Cir. 1986), is even more difficult to understand: Neither *Thomas* nor *Sutton* involved an anonymous tip.

Nor does the Fifth Circuit's decision in another case, also entitled *United States v. Rodriguez*, 835 F.2d 1090 (5th Cir. 1988), support the result the majority reaches here. In that case, the investigating customs agent was able to verify that the anonymous informant had accurately stated the license number of a truck that would be lightly

loaded with watermelons at a particular fruit company, with room left in the truck for contraband. The agent followed the truck from the fruit company to a small fruit stand, where he observed boxes sometimes used to transport marijuana being *loaded onto* the truck. Because this degree of corroboration far surpasses anything offered by the Government here, the majority's citation of the Fifth Circuit's *Rodriguez* opinion does not provide support for its decision.

The majority suggests that the law of the District of Columbia Circuit would justify finding reasonable suspicion based solely on police confirmation that the anonymous tip correctly described Alvarez and his car and accurately identified their location. *United States v. McClinnhan*, 660 F.2d 500 (1981); *United States v. White*, 648 F.2d 29, *cert. denied*, 454 U.S. 924 (1981). We are of course entitled to consider the D.C. Circuit's decisions as persuasive authority, and to follow them if we deem them correct; but here the majority provides no justification for the adoption of that circuit's law over any other principle. *Cf. White*, 648 F.2d at 43 (question whether an anonymous tip corroborated only by observations of innocent details justifies a *Terry* stop is a live and disputed one in circuit and state courts); *Jernigan v. Louisiana*, 446 U.S. 958 (1980) (White, J., joined by Brennan and Marshall, JJ., dissenting from a denial of certiorari and calling for resolution of whether corroboration of innocent details is sufficient for a *Terry* stop); *Alabama v. White*, 58 U.S.L.W. 3443, 3449 (U.S. Jan. 16, 1990) (No. 89-789) (granting certiorari on the issue raised ten years earlier in *Jernigan*). Once *White* and *McClinnhan* are examined with care, the majority's endorsement of them becomes extremely troublesome.

First, those decisions appear to be in some conflict with the way this court has handled the corroboration of tips in general and anonymous tips in particular. We have emphasized – as did the Supreme Court in *Gates* – "that when examining information provided by an informant, the two-prong *Aguilar-Spinelli* test, *Spinelli v. United States*, [393 U.S. 410 (1969)]; *Aguilar v. Texas*, [378 U.S. 108 (1964)], is 'highly relevant' in determining the value of the information." *United States v. Miller*, 753 F.2d 1475, 1479 (9th Cir. 1985) (citing *Gates;* parallel citations omitted); *see also United States v. Angulo-Lopez*, 791 F.2d 1394, 1396-97 (9th Cir. 1986). While *Gates* holds that "a weakness in either the 'veracity' or 'basis of knowledge' prong is not fatal," *Angulo-Lopez*, 791 F.2d at 1396, the tips held reliable in *White* and *McClinnhan* – and in the majority's decision today – suffer from more than mere "weakness." All three tips were in the form of anonymous telephone calls to the police which disclosed *absolutely nothing* to show either the informant's veracity or the basis of the informant's knowledge.[10] Our prior decisions deem this "highly relevant," yet the D.C. Circuit is apparently willing to credit anonymous tips fully, "[e]ven without these indices of reliability," *White*, 648 F.2d at 44.[11]

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[10] Some anonymous tips have a higher degree of reliability because the details supplied by the informant are so specific, or are of a nature (*e.g.*, a prediction of future conduct) that they establish the personal knowledge of the informant. *Gates*, 462 U.S. at 234. The kinds of tips and corroboration of details upon which the D.C. Circuit would apparently allow reasonable suspicion to be founded are of a far lesser order.

[11] Arguably, not even the D.C. Circuit goes this far. The phrase quoted in the text is in some conflict with the *White*

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Second, it is difficult to see how the almost nonexistent level of corroboration apparently sufficient under *White* and *McClinnhan* can possibly be consistent with the requirement that an investigative stop be justified by "some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *Cortez*, 449 U.S. at 417; *Thomas*, 863 F.2d at 625. By appealing to the principles announced in *White* and *McClinnhan*, the majority today approves a seizure based only on an objective manifestation that Alvarez was tall, dark, Mexican, and parked in a bank parking lot. I believe that our prior decisions clearly require more, and I see no justification for adopting the lower level of scrutiny that apparently prevails in the D.C. Circuit.

Finally, I believe *McClinnhan* and *White* would be questionable decisions even if they did not contravene settled principles in this circuit. As the *McClinnhan* court

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panel's narrower statement, concluding "that an anonymous tip *about an ongoing transaction*, detailed as to time and place, including a specific description of one of the participants and their vehicles as well as their modus operandi, *and verified by the officers through surveillance in all details* except for the actual possession or exchange of narcotics provides a sufficient basis for a legitimate *Terry* stop to question the occupants as to their identity and visually check inside the car." 648 F.2d at 43 (emphasis added). Likewise, the *McClinnhan* court noted that it was considering "an anonymous tip that, while lacking facial indicia of reliability, was *corroborated in every significant detail* by [the police officers'] pre-stop surveillance." 660 F.2d at 502 (emphasis added). To the extent that *White* and *McClinnhan* require corroboration "in all details" or "in every significant detail," the majority's more expansive decision today is truly unprecedented.

conceded, "[I]t is possible for anyone with a grudge to fabricate a tip whose neutral details, such as clothing or location, would provide the corroboration required by the *White* decision for a stop." 660 F.2d at 502. This by itself permits a significant intrusion on the liberty of those who may be the subject of such fabrications. Apparently, the D.C. Circuit is willing to pay this price, or rather to have it paid by those whom the police are most likely to stop. However, the opinions in *White* and *McClinnhan* fail to note that if the anonymous tipster also fabricates an allegation that the "suspect" is armed or dangerous, then police officers are entitled to converge upon the "suspect" with guns drawn, issuing orders that would cause any law-abiding citizen considerable distress. Misunderstandings are to be expected in such situations, and the lives of innocent citizens are thereby placed in jeopardy, all without requiring the police to identify anything that is genuinely *suspicious* about the "suspect's" conduct.

In summary, I do not find *White* and *McClinnhan* persuasive, and I find nothing in the majority's discussion of them to allay my concerns about the extent to which they conflict with our prior decisions. Nor do I believe that the majority has otherwise justified its reversal of the district court's suppression order. I would therefore affirm that order on the ground that the Santa Ana police lacked a reasonable suspicion when they stopped Alvarez.

UNITED STATES of America, Plaintiff,

v.

Jack Manuel ALVAREZ, Jr., Defendant.

No. 88-035-JSL.

United States District Court,
C.D. California,
Los Angeles Division.

Aug. 11, 1988.

Defendant charged with possession of cocaine and weapons moved to suppress evidence. The District Court, Letts, J., held that anonymous tip that defendant was about to rob bank was not, in itself, sufficient to give rise to reasonable suspicion for officers to stop defendant's car after he left bank parking lot.

Motion granted.

1. Arrest 63.5(6)

Anonymous tip that defendant was about to rob bank was not, in itself, sufficient to give rise to reasonable suspicion for officers to stop defendants car after he left bank parking lot where nothing which was observed by arresting officers suggested that defendant had gone to bank parking lot with any criminal intent. U.S. C.A. Const.Amend. 4

2. Arrest 63.5(4)

Searches and Seizures 37

Government may not manufacture its own "reasonable suspicion" in order to justify otherwise illegal stop and search. U.S. C.A. Const.Amend. 4.

Thomas J. Umberg, Santa Ana, Cal., for plaintiff.

Marshall M. Schulman, Schulman & McMillan, Santa Ana, Cal., for defendant.

MEMORANDUM, AND ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS

LETTS, District Judge.

This matter is currently before the Court on defendant Jack Manuel Alvarez, Jr.'s ("Alvarez") motion to suppress evidence that was allegedly seized in violation of the fourth amendment. The evidence in question consists of a machine gun, an automatic rifle and a quantity of cocaine, the possession of which accounts for all three counts of the indictment in this case. After careful consideration of the document submitted in connection with this motion oral argument by counsel and the testimony of witnesses presented at an evidentiary hearing held July 28, 1988, the Court concludes that the motion must be granted.

FACTS

The facts, as stated by the United States in its opposition papers and accompanying declarations are relatively straightforward. On May 12, 1988, at approximately 10:28 a.m., an unidentified male caller telephoned the Santa Ana Police Department and said "I have information of a possible robbery of a bank this morning." The caller refused to identify himself, but claimed that the robbery "is going to happen this morning in about 10 minutes at the Bank of America on 8th and Main. The man is driving a white Mustang GT and he's got explosives with him." When asked by the police dispatcher how the caller knew what was going to happen, the caller responded, "I know it's going to happen. Just believe me, he's there." The caller described the purported bank robber as a tall, dark, male, "looks kinda Mexican," and stated that he was located "in the back of the bank."

Based on this information, several patrol cars was dispatched to the bank. Upon arrival, the officers observed a white Mustang GT in the bank's parking lot. The Mustang was occupied by a dark haired, Hispanic male who was later identified as Alvarez. The officers observed the car and its occupant for approximately 5 minutes. The white Mustang then departed the bank parking lot and headed north on Main Street. The police followed the car in their patrol cars. After a short time, the police stopped Alvarez' car. One of the officers immediately ordered Alvarez over his public address system not to move and to keep his hands in plain sight. The officers then approached the defendant with their guns drawn. Alvarez was told to step out of the vehicle. As

Alvarez stood outside of the vehicle, a bulge was observed under his jacket. A pat-down search revealed two semi-automatic, 9 millimeter pistols. The police then searched defendant's car and found a disassembled M-60 machine gun, an M-16 fully automatic rifle, and a substantial quantity of cocaine in the trunk.

The Court has also considered the following testimony adduced at the July 28, 1988 hearing. The "anonymous caller" referred to above was Michael Enrique Soler ("Soler"), a personal acquaintance of Alvarez. At the time that Soler made the telephone call to the police. Soler had been released on bail while awaiting trial in the San Bernardino Superior Court on charges of sale and transportation of cocaine.

Soler testified that he spent the morning of the day upon which Alvarez was arrested with Alvarez. Soler testified that the two had met for breakfast in Upland and that during this time Alvarez confided in him that he had a gun and that a "big deal was going down." According to Soler, he was intending to go shopping at South Coast Plaza that day. Although admittedly far out of his way, Soler testified that he followed Alvarez to the Bank of America in Santa Ana. As soon as he saw Alvarez turn toward the bank, Soler went directly to a nearby public telephone and called the police to report what he considered to be "a crime in progress."

Soler's testimony that he called the police out of a sense of civic responsibility was not credible. Nothing in his testimony revealed any reason for him to believe that Alvarez was about to rob the bank. Alvarez had no

known propensity for bank robbery, and his criminal record did not reflect any.[1]

Soler's conduct after making the call also belies any deep-seated animosity for Alvarez which might account for his action. After making the arrest of Alvarez, Soler placed a telephone call to Alvarez' father, advised him that Alvarez had been arrested, and recommended that he engage an attorney by the name of James Brustman to represent him. Brustman also represents Soler in the San Bernardino matter. On the same day, and several times thereafter, Soler also had telephone conversations with Debra Chalupnick, who by affidavit describes herself as defendant's girlfriend. Indeed, at the hearing, Soler testified that he felt "bad" about having called the police.

DISCUSSION

The issue most clearly posed by the facts of this case is whether the police can lawfully stop a vehicle or person with their guns drawn, acting solely on the basis of an anonymous phone call properly identifying where the person could be found, without any supporting objective evidence that a crime is being, has been or is about to be committed. The United States urges that at the time they stopped Alvarez, based upon the phone call and confirmation of Alvarez' location, the police had "reasonable suspicion" to conclude that a crime had been committed

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[1] In addition, since Soler himself had a criminal record, and took refuge in his fifth amendment rights numerous times during his testimony, there is little reason to believe that he shares the views of average citizens concerning the public need for preventing crime and apprehending criminals.

which would justify the stopping of Alvarez' vehicle and the approach to him with their guns drawn.

For this proposition, the government relies on the line of cases beginning with *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Under *Terry* and its progeny, police officers may make an investigatory stop of an individual or vehicles upon less than probable cause if, under the totality of the circumstances, they can point to articulable facts which support reasonable suspicion that the person stopped is engaging in or about to engage in a crime. *Terry*, 392 U.S. at 21, 88 S.Ct. at 1879; *Guam v. Ichiyasu*, 838 F.2d 353 (9th Cir. 1988).

As stated in *United States v. Hensley*, 469 U.S. 221, 228-29, 105 S.Ct. 675, 680-81, 83 L.Ed.2d 604 (1985), the law should not require law enforcement officers to refrain entirely from investigating crimes or persons as to whom they have "reasonable suspicion." Moreover, where a police officer has knowledge that a crime has been committed, the perpetrator was armed and dangerous, and the officer has reasonable suspicion that a particular suspect committed the crime, the officer is authorized to take such steps as reasonably necessary to protect the officer's personal safety. *Id.* at 235, 105 S.Ct. at 683. Under such circumstances, the law should not require that the suspect be approached, if at all, by an officer whose weapon is holstered. *Id.* at 235, 105 S.Ct. at 683.

This case does not require the Court to inquire how far *Hensley* may be said to have overruled or limited earlier Ninth Circuit cases which appear to have held that a stop with weapons drawn amounts to an arrest and

must be supported by probable cause.[2] In this case, it is clear that at the time Alvarez was stopped, the officers did not have even reasonable suspicion that Alvarez had committed, was committing or was about to commit any crime.

A. Lack of Reasonable Suspicion

The tip received by the Santa Ana Police was that Alvarez was about to rob a bank. It was an anonymous tip, the credibility of which rested not on any facts which the caller purported to have learned by observation, but rather on facts as to which he professed to have independent personal knowledge. The caller did not claim to have seen anything which led him to believe either that Alvarez was going to rob the bank or that he was carrying explosives; he merely made his statements as truths of which he had independent knowledge.

Other than the claim of personal knowledge, this caller had none of the attributes which other courts have pointed to as adding credibility to his bald statement. He was not known to the person to whom he spoke as a reliable informant. *Adams v. Williams*, 407 U.S. 143, 146, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612 (1972). Indeed, the informant was entirely unknown and anonymous even to the police. He was not personally present, nor readily

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[2] *See United States v. Strickler*, 490 F.2d 378 (9th Cir.1974). *See also United States v. DeVita*, 526 F.2d 81 (9th Cir.1975); *United States v. Larkin*, 510 F.2d 13 (9th Cir.1974). In light of *Hensley*, it appears that stopping a suspect at gunpoint, where there is a clear threat to the officer's personal safety, is within the *Terry* stop. *Hensley*, 469 U.S. at 235, 105 S.Ct. at 683.

available so that if the information which he provided proved to be false he could be immediately confronted. *Adams*, 407 U.S. at 146, 92 S.Ct. at 1923; *United States v. Sierra-Hernandez*, 581 F.2d 760 (9th Cir.),*cert. denied*, 439 U.S. 936, 99 S.Ct. 333, 58 L.Ed.2d 333 (1978). He did not predict any of the details of the manner in which the crime would be conducted,[3] nor were his assertions affirmed in any way by Alvarez' actions while under police surveillance.[4]

At the time the police arrived at the bank, they had no reason to believe that Alvarez had actually done anything from which it might be concluded that he was about to rob a bank, or was carrying explosives. All they had was the unadorned statement to this effect from an unidentified informant.[5]

From the time that Alvarez first was observed by the arresting officers until the time he was stopped, he did nothing from which it might be concluded that he had gone to the bank for the purpose of robbing it, or that he was carrying explosives. To the contrary, before stopping him, the police observed Alvarez parked in his vehicle in the bank parking lot for approximately five minutes.

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[3] *See Illinois v. Gates*, 462 U.S. 213, 245, 103 S.Ct. 2317, 2335, 76 L.Ed.2d 527 (1983).

[4] *Gates*, 463 U.S. at 242-44, 103 S.Ct. at 2334-35.

[5] *See Adams*, 407 U.S. at 146, 92 S.Ct. at 1923 ("we believe that Sgt. Connolly acted justifiably in responding to his informant's tip. The informant was known to him personally and had provided him with information in the past. This is a stronger case than obtains in the case of an anonymous telephone tip."). *See also* 3 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* Section 9.3(e) at 482-83 (2d ed. 1987).

Instead of getting out of his car and approaching the bank or otherwise acting in a manner consistent with an intent to rob the bank, Alvarez simply left the bank parking lot. The police then trailed him for some distance as he drove unhurriedly away. During this time, the police received no information tending to indicate that the bank had been robbed, or that any other crime had been committed with which Alvarez might have been associated. Nothing in Alvarez' conduct which was observed by the arresting officers suggested that he had gone to the bank parking lot with any criminal intent.[6]

Regardless of whether the lawfulness of the search in question is to be tested on the basis of probable cause or reasonable suspicion,[7] therefore, the search in question was unlawful because it cannot meet either test. Anyone can make an accusation. Anonymous accusations can be made with impunity. Anyone, including the police, can make an anonymous and unidentified phone tip. If the exclusionary rule were not applied to the facts in this case, there would be nothing to stop a police officer who wished to search any person in the hope of finding evidence of a crime from making an anonymous phone call to his own or some other police department, identifying and locating the person to be searched, and accusing him

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[6] Indeed, although the search following the stop revealed evidence of the other crimes with which the defendant is here charged, there remains to this day almost no reason to believe that Alvarez went to the bank parking lot with the purpose of robbing the bank, or that he was carrying explosives.

[7] *See supra* note 2.

of committing or about to commit some crime. A gunpoint stop cannot be justified on the basis of anonymous and unidentified bald accusations, where nothing else the police observed gives any reason to believe a crime is being, has been or is about to be committed. In such circumstances, there can be neither probable cause nor reasonable suspicion which would justify the gunpoint stop and search.[8]

The importance of this issue should not be minimized. The more broadly the law construes the duty of police officers to investigate suspicious circumstances and their right to do so with drawn weapons, the more likely it becomes that innocent persons will die or be seriously injured. Anytime two people confront each other with weapons drawn, there is a great risk that one or both will shoot.[9] Because the likelihood of tragedy is so high when armed confrontations become necessary, it is of the utmost social importance to clearly and narrowly define the occasions which call for such highly volatile confrontations.

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[8] In *United States v. Greene*, 783 F.2d 1364, 1367 (9th Cir.), *cert. denied*, 476 U.S. 1185, 106 S.Ct. 2923, 91 L.Ed.2d 551 (1986), although the Court held that the police were justified to make a *Terry* stop, the Court carefully pointed out that the stop was made with weapons holstered, and they were drawn only after the suspect failed to obey a lawful order. *See id.* at 1366.

[9] The Court has published as a companion case hereto, excerpts from a previously unpublished opinion, *Murphy v. City of Long Beach*, ___ F.Supp. ___, No. CV 84-5383 JSL (C.D. Cal. Nov. 9, 1987), showing a particularly tragic example.

B. Soler's Cooperation with Law Enforcement Officials

The Court is also troubled at how strongly the evidence points to the possibility that Soler was working with law enforcement officials to create the appearance of reasonable suspicion by which the stop and subsequent search might be justified. Although law enforcement officers testified as to their belief that Soler was not acting in this capacity, and that based upon their experience they would be aware of it if that were the case, this testimony was not wholly credible. The examination upon which these beliefs were based was superficial at best, and was not calculated to reveal any but the most obvious truths. In particular, it seems clear that no effort was made by the government to exhaust the possibility that Soler was cooperating with federal authorities.

Additionally, the record of the hearing contains at least a hint of why Soler might have been cooperating with law enforcement officials when he made the telephone call to the Santa Ana Police. At the hearing. Soler admitted knowing and making contact with an individual identified as Modesto Perales. The evidence suggested that Perales is an ex-police officer and that he may have been the source of supply of cocaine to both Soler and Alvarez. Although neither counsel nor any witness for the United States seemed to be aware of it at the time of the hearing, the Court takes notice that its own docket contains a three count indictment against Perales for possession with an intent to distribute and for distribution of cocaine. If in fact, in cooperation with the United States, Soler induced Alvarez to go and wait at the bank with cocaine and weapons, and then made the "anonymous"

telephone call, a motion to suppress would have to be granted. The government may not manufacture its own "reasonable suspicion" in order to justify an otherwise illegal search.[10]

At the hearing, before taking notice of the Perales indictment, the Court ruled that the defendant had not met its burden of proving that Soler had acted at the behest of the government, and thus, the evidence would not be suppressed on that ground. Were it not otherwise necessary to suppress this evidence, in light of all the evidence before the Court tending to indicate that Soler may have acted in cooperation with law enforcement authorities, the Court would be inclined to at least to invite more evidence on the question. The Court concludes, however, that a supplemental hearing is unnecessary because the motion should be granted solely on the admitted facts as stated by the United States.

IT IS SO ORDERED.

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[10] *See generally* 3 W. LaFave, *supra* note 6, at 484-85. *Cf. United States v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 694, 66 L.Ed.2d 621 (1981) ("officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.")